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power, while discretionary, would not be arbitrary; where ordered unjustly or unreasonably, the suspension could be set aside.

While the language of the opinion of the Supreme Court denies the right of the courts to exercise the power to suspend either the imposition or the execution of a sentence, the scope of the decision is limited to the power to suspend the execution of an imposed sentence. It is possible to draw a distinction on the ground that the latter so closely resembles a pardon as to render its exercise by the courts unconstitutional, and yet the power to suspend the imposition of sentence be sustained. While the recognition of such a distinction by the Supreme Court would be fortunate, in that it would save to the courts much of this desirable power, yet on principle it would seem that the validity of the practice, in whichever form, must depend ultimately upon the same considerations.

It is hardly to be expected that the matter will be left as it is at present. The court intimates that the legislative power of Congress is adequate to meet the demands of the situation. It is submitted that the establishment of a board of probation, while helpful, would at most provide an expensive, cumbersome, and inadequate mechanism to meet the demands of the individual case.[20] Hence it is desirable that the legislation take the form of vesting in the courts themselves the power to suspend sentence indefinitely.[21]

PRACTICAL METHODS OF APPROACHING THE CONSTRUCTION OF WILLS. — Two distinctly different methods of approaching the construction of testamentary dispositions have become current.[1] The first, in vogue in most American jurisdictions, is the expression of a violent reaction against the over-technical and highly refined rules of construction so nicely employed by the common-law judges, the application of which often resulted in dispositions quite contrary alike to any intention the testator might have had, and to general notions of fairness, as was the case with the rule that "dying without issue" meant an indefinite failure of issue.[2] So the judges went to the other extreme, declaring that the testator's intention should control each case, and "that the mode of dealing with one man's blunder is no guide as to the mode of dealing with another man's blunder." [3] No doubt all this is true, if we know what the testator intended. But the courts have been influenced in no small degree by taking a fic-

[20] This is true because of the wide territory over which such a board would have to operate.

[21] The Act of July 25, 1910, 36 STAT. AT L. 864, established a probation system in the District of Columbia providing, *inter alia*, for the suspension of sentence by the courts.

[1] To what sources outside the four corners of the will the court may go for facts and circumstances, and what standard of interpretation it will apply, belongs to the science as distinguished from the practical art of construction. The science of construction determines what materials the court may use; the art of construction is the practical method the court employs in using these materials. It is of the former that Wigmore (EVIDENCE, Vol. IV), Thayer (PRELIM. TREAT. EVID.), and Hawkins (JURIDICAL SOC. PAPERS, II, 298) treat. The late Professor Gray, on the other hand, in THE NATURE AND SOURCES OF THE LAW, § 700 *ff.*, deals with the latter. See also, Holmes, "The Theory of Interpretation," 12 HARV. L. REV. 417; JARMAN, WILLS, Sweet's 6 ed., 503; Boyes *v.* Cook, 14 Ch. Div. 53 (1880).

[2] See GRAY, NATURE AND SOURCES OF THE LAW, § 701.

[3] *Ibid.*

tion as a fact. For in the vast majority of cases presenting problems of construction, the testator's mind, so far as we can judge from his words, has never contemplated a situation such as has arisen. "When the judges say they are interpreting the intention of a testator, what they are doing, ninety-nine times out of a hundred, is deciding what shall be done with his property on contingencies which he did not have in contemplation." [4] The facts from *Doe* v. *Eyre* [5] may be taken as an illustration. There a testatrix, having the power of appointment in fee among a class, appointed to her son in fee, but if he should not be living at his father's death, then over to one not in the class. The son predeceased his father, but, of course, the gift over was ineffective. Upon this contingency, which the testatrix never contemplated, are we to say she "intended" the divesting clause to include the vesting of the gift over, or not? Of course, no one can know what the testatrix intended. But courts can determine, in the light of what they now know which she never knew, what they would have intended had they been the testatrix. And this determination can be assigned to the testatrix, under the guise of *her* intention, and the problem is solved, at least for one case. But just what that result would be defies prediction. One court might feel that the son should keep the fee, and declare that the testatrix so "intended"; another might see a wife as the son's sole heir-at-law, and be certain that the testatrix surely intended to keep the property within the family. Which would be taken depends entirely upon the personal equation of the court trying the cause. As each and every question is necessarily uncertain until adjudicated, attorneys are at a loss to advise a client as to what his rights might be. As the late Professor Gray said, "There are jurisdictions where no counsel dares to advise on what is to be done with property that is bequeathed to 'heirs.'" [6] A striking example of this uncertainty is afforded in a series of Illinois decisions. In February, 1912, that court held contingent a certain remainder,[7] and in October, 1914, held vested a remainder to all intents and purposes the same as that in the previous case.[8] And again the court held contingent a certain remainder,[9] and within two months thereafter held vested a remainder in all essential respects the same as the first one.[10] Why the difference was made was not disclosed. The whole method seems to degenerate into a preliminary determination by the court of the result they would personally like to reach, and then reaching it by blandly declaring that the testator so willed.

In England the reaction against super-refined rules took on a different aspect. Objectionable technicalities and refinements have been eliminated, but the mode of dealing with one man's blunder has ever been a guide as to the mode of dealing with another's man blunder. Of course, where the testator has expressed an intention, it must be given effect.[11]

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[4] GRAY, NATURE AND SOURCES OF THE LAW, § 702.
[5] 5 C. B. 713.
[6] GRAY, NATURE AND SOURCES OF THE LAW, § 704.
[7] People *v.* Byrd, 253 Ill. 223, 97 N. E. 293.
[8] People *v.* Carpenter, 264 Ill. 400, 407, 106 N. E. 302.
[9] Hill *v.* Hill, 264 Ill. 219, 106 N. E. 262.
[10] Lachenmyer *v.* Gehlbach, 266 Ill. 11, 107 N. E. 202.
[11] Gray, J., in Robinson *v.* Martin, 200 N. Y. 159, 166, 93 N. E. 488, 490: "There is no need to have resort to any rules of construction; for the rule of intention overrides

It is in that class of cases where he has not expressed an intention that the two methods part company. This school recognizes first of all that there is no expressed intention to carry out; that we must face the problem of what to do with a man's property where he has left no directions. Conceivably the court should attempt to find out what the testator intended but forgot or failed to express, or what he never intended at all but would have intended had he known what the courts now know. If human intelligence could determine these facts, it would be ideal. But such is impossible.[12] For cases in which the testator has not consciously provided, it is well to have fixed rules, as there are for descent in cases of intestacy; the two situations are closely analogous. But here are words which cover the case. Although not written in contemplation of the present contingency,[13] these words form the only certain and definite basis from which to determine the disposition of the property. So unless it appears from circumstances outside the will to which the court may properly look,[14] or from disclosures on the face of the will itself,[15] or from some incongruity of result that would follow,[16] that the

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all such. It is only where the will fails to express, or to disclose, an intention that we must resort to the rules that the decisions have established."

[12] "It is true that the testator is a despot . . . over his property, but he is required by statute to express his commands in writing, and that means that his words must be sufficient for the purpose when taken in the sense in which they have been used by the normal speaker of English under the circumstances." Holmes, "The Theory of Legal Interpretation," 12 HARV. L. REV. 417, 420.

[13] The same is true of the situation where the testator did contemplate the contingency, but failed for some reason to express to us his intention in case it occurred. It is often quite impossible to tell which of the two situations we are facing.

[14] Thus if a testator left his "go-cart" to his son, the family "go-cart" would pass unless the son showed that the father habitually spoke of the Packard as the "go-cart," in which event the automobile would pass. We are not seeking here the testator's intention as such, but the way in which he employed the English language. It would be useless to urge that he wrote "go-cart" when he really meant to write "Packard."

[15] The facts in Harman *v.* Dickenson, 1 B. C. C. 91, illustrate a situation where a secondary meaning will be taken in preference to the primary meaning from facts gathered from the fact of the will itself. The testator left property in trust for two daughters, A. and B., for life, and if either died with issue, that issue to take the parent's share in fee; but if both died without issue, then over, provided that if one die without issue, the whole to go in fee to the "survivor." A. died first, leaving issue; then B. died without issue. If we take the ordinary meaning of "survivor" we find that the testator has provided for three out of four possible contingencies — the fourth being the one which has happened. But if we construe "survivor" as meaning "other," the testator has provided for every contingency. As an original question, this step seems open to the grave objection that "other" is not even a remote secondary meaning for "survivor." But this decision has established such a meaning. And since it does give a definite rule, and one not out of harmony with our notions of fairness, it is preferable to any system leaving the question open to the caprice of each court that may be called upon to construe such language. But where a word legitimately has two meanings, the application of the principle of this case is unquestionably proper.

[16] In Scott *v.* Bargeman, 2 P. Wms. 68, the testator left an estate for life to his widow, "and after her death in trust that J. S. shall divide £900 equally among three daughters at their respective ages of twenty-one or marriage, provided that if all three die before their legacies become payable," then over. Two of them died unmarried and under twenty-one. The surviving daughter, now over twenty-one, claimed the entire fund. The court held her entitled thereto. The daughters took contingent interests only. If we accept the primary meaning of the language, if one die, her share at once vests in the executor as intestate personalty; so when the second dies. But upon the death of the third, unmarried and under age, the whole then jumps and vests in the donee of the gift over. Such a result the law declares "incongruous." So cross-

testator was using the words in a sense other than that ordinarily ascribed thereto by dictionaries and decisions, that primary meaning will be taken and the property disposed of in strict accordance therewith.[17]

Contrast the results obtained from the application of the two methods. We saw in the *Eyre* case, *supra*, the uncertainty following an attempt to apply the first method. If we employ the second, we first inquire the primary meaning of the divesting clause: "If the son should not be living at the death of her husband," then over to his uncle. While it may be argued that the validity of the gift over is an integral part of the divesting clause, the better view seems that it is not. There is no reason why we should not apply this primary meaning and allow the property to pass as intestate. This the court decided in *Doe* v. *Eyre*, and the definite principle there established was followed in *Robinson* v. *Wood*.[18] English lawyers know exactly how their courts will deal with such a situation and upon what considerations analogous cases will be decided.

The facts in *Harrison* v. *Foreman* [19] also afford good material for comparison. After a life estate to the wife, an absolute interest was given, share and share alike, to the children, Peter and Susan; but in case of the death of either during the mother's life, the whole estate to go to the survivor, with ultimate remainders over. Both Peter and Susan died before their mother. Obviously the testator had not considered such a contingency. Applying the first method, it would be very easy to feel the testator would have liked to have the gift over take effect if both children died during their mother's life, especially if the gift over happened to be to the testator's brother and the son's sole heir was his wife. It would be just as easy to feel that he must have intended his children to take, especially if they had children surviving them or the gift over was to a distant relative or stranger. But just which one a court would take is mere conjecture. Applying the English method, we find that the divesting clause, in its primary meaning, calls for the death of *one* child in the mother's lifetime. There is no reason to depart from this meaning. Since the contingency did not happen because *both* died before their mother, the divesting clause was inoperative and the heirs of Peter and Susan were held entitled to a fee as tenants in common.

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remainders are implied to prevent this. Again this has the virtue of being an established rule.

[17] In O. *v.* D., [1916] 1 I. R. 364, the testator left property to his "children." An illegitimate daughter claimed under this provision. Ross, J., in holding that she was entitled, declared that in order to find the testator so intended "we are driven to speculate and conjecture, and that is forbidden"; the primary meaning, *i.e.*, "legitimate children," must be taken in the absence of special considerations. These he found from the context of the will and the circumstances surrounding the testator. See Robinson *v.* Wood, 27 L. J. Ch. 726; O'Mahoney *v.* Burdett, L. R. 7 H. L. 388. Lord Redesdale said, in Jesson *v.* Wright, 2 Bligh 1, 56, 57, "The rule is that technical words shall have their legal effect unless from subsequent inconsistent words it is very clear that the testator meant otherwise." So Mr. Justice Holmes says in "The Theory of Legal Interpretation," *supra*, "A word generally has several meanings even in the dictionary. You are to consider the sentence in which it stands to decide which of those meanings it bears in the particular case. . . . So when you let whatever galvanic current that may come from the rest of the instrument run through the particular sentence you are still doing the same thing."

[18] 27 L. J. Ch. 726.

[19] 5 Vesey, 207.

Whichever way the court might decide under the first method, its decision would be of no use outside the particular case. The same uncertainty would attend the next appearance of substantially similar facts. But in England this point is settled for good by this decision. The importance of practical difference between these two situations can hardly be exaggerated.

Two recent decisions give promise that the Supreme Court of Illinois has adopted the second method. In *O'Hare* v. *Johnston*[20] the testator left stocks to trustees to pay one half the income to his son and one half to his daughter for a period of thirty years, and then to distribute the fund equally between them; provided that if either child died within the thirty years without issue, the income from the whole and the principal thereof at the end of the term be paid to the survivor; and further that if either child died leaving issue, the income and principal, at the end of said period, "hereby given to its or their parents," be paid to that issue. At his death, neither child had issue. Both died within the thirty years, the son without issue, but the daughter leaving a daughter surviving her. If the granddaughter's interest vested on her mother's death, it was valid; but if contingent upon the child's surviving the thirty-year period, it was too remote. Obviously the testator intended her to take the property; but we have no expression from him as to when such interest was to vest. Probably he had never considered it. From one angle of approach, the case is easy. The testator intended the child to take; it is possible to construe the limitation to avoid the rule against perpetuities; therefore her interest is vested upon her mother's death. This is improper; here we are dealing with a rule which defeats intention. Any such attitude as that suggested would leave the application of the rule against perpetuities, wherever a possible construction would permit, to the individual prejudice of the court. The court here did not proceed along such methods, but set about to determine the effect of the language used in the light of the judicial caution and experience of previous decisions. The court declares "that the principles of former decisions should be kept in mind, for while the testator's intention is implicitly obeyed . . . yet the courts in construing that language resort to certain established rules by which particular words and expressions, standing alone, have obtained a definite meaning."[21] And this is what the court did. A primary meaning was being sought, where no meaning appeared clear. Analogous cases and various cautions were weighed in making the final decision, that the remainder vested on the mother's death. Although the court reverted to the familiar talk about each case being decided as distinct from all others,[22] there is at least a suspicion that this was resorted to in order to avoid the enforcement of several doubtful decisions previously handed down in Illinois which the court did not care to follow. Whatever the language, the method is distinctly different from that formerly used in Illinois.

The case of *Abrahams* v. *Saunders*[23] is an excellent illustration of the application of the English method. The testator devised realty to his

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[20] 273 Ill. 458, 113 N. E. 127.
[21] Quoting from 2 JARMAN, WILLS, Bigelow's 6 ed., *1651.
[22] Quoting from Gulliver *v.* Poyntz, 3 Wils. 141, 143.
[23] 113 N. E. 737.

widow for life, with remainder to his son in fee, provided that "in the event he should die without definite issue and before this will takes effect," the gift to go over. The son survived the testator but died without issue in his mother's lifetime. The *quantum* of his estate was in issue. The testator, very probably, was unconscious of any contingency which would make the ultimate disposition of his property depend upon the construction of this ambiguous phrase. The primary meaning of "before this will takes effect" is, of course, "before the testator dies." But a secondary meaning, "before the devisee takes possession," is possible. This the court adopted upon three considerations: the same words were used in another connection in such a context as to indicate that the testator employed them in this secondary meaning; in another place in the will he had specifically provided concerning his wife's death before his own in commonplace language, indicating that had he meant his son's death before his own as the contingency, he would have employed such ordinary language, and not technical language, to express it; and the further notion that the testator is presumed to prefer to have the property remain in his family. The other construction would have allowed his wife to have taken. This last reason may be legitimately used in close cases; but it should be used only as a determining rule, analogous to rules of intestacy, and not as a giving effect to the testator's intention. It has been much abused, so that it has come in some instances to militate against a son's widow taking if some construction is possible which will bar her.

It is sincerely to be hoped that the Supreme Court of Illinois will follow the lead it has established in these two cases. Under any scheme, of course, each case must be decided substantially apart from all others; but the bar is given something with which to work far more tangible than a guess as to what the Supreme Court might feel was the fair thing to do as Christian gentlemen. They know that the language used will be given its ordinary and primary meaning unless there are good reasons for accepting a secondary meaning. And they know what facts and circumstances will be weighed by the court to determine which meaning shall prevail. The ultimate decision is a matter of the court's judgment; but it may be known beforehand what considerations will be weighed on either side of the scale.

STATUTORY AUTHORIZATION AND THE LAW OF NUISANCE. — The North Melbourne Tramways Company was authorized by legislative act and municipal regulations made thereunder to operate electric street cars, and was doing so, using the ordinary trolley pole and wire system for distributing current to its cars. One of the safeguards of its system was a ground wire running from an overhead and supposedly uncharged wire to a rail-end. This ground wire was uninsulated and was carried down inside a metal post. An accident to the system charged the overhead wire and so the ground wire and the post. The short circuit arranged by the contact with the rail-end was ineffective because a place in the ground wire was corroded. The plaintiff touched the post and suffered severe burns. When he sued, the jury found that there had been no negligence in the conduct of the defendant's enterprise. Judgment